Supreme Court, U. S.
FILED
NOV 9 1978
MICHAEL RODAK, JR., CLERK

Nos. 78-340, 78-5313, 78-396 and 78-398

In the Supreme Court of the United States

OCTOBER TERM, 1978

ERNEST R. HAMILTON AND CHARLES W. SCHUBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

CORNEL LEAHU, PETITIONER

v.

UNITED STATES OF AMERICA

CHARLES C. FITZGERALD, PETITIONER

v.

UNITED STATES OF AMERICA

ALFRED KOVACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
JOHN C. WINKFIELD
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Conclusion	19

CITATIONS

Cases:

Blumenthal v. *United States*, 332 U.S. 539	10
Daley, In re, 549 F.2d 469	16
Davis v. *Alaska*, 415 U.S. 308	14
Grand Jury Investigation, In re, 486 F.2d 1013	16
Kann v. *United States*, 323 U.S. 88	12, 13
Kotteakos v. *United States*, 328 U.S. 750	10
Opper v. *United States*, 348 U.S. 84	11
Parr v. *United States*, 363 U.S. 370	12
Pereira v. *United States*, 347 U.S. 1	12
Saltonstall v. *Saltonstall*, 276 U.S. 260	19
Shaffer v. *United States*, 362 U.S. 511	11
Thompson v. *Garrison*, 516 F.2d 986, cert. denied, 423 U.S. 933	16
United States v. *Andolschek*, 142 F.2d 503	10
United States v. *Bastone*, 526 F.2d 971, cert. denied, 425 U.S. 973	14
United States v. *Blackwood*, 456 F.2d 547	15
United States v. *Garrett*, 542 F.2d 23	15
United States v. *Hollinger*, 555 F.2d 535	16
United States v. *Kelly*, 349 F.2d 720	11

Cases—Continued	Page
United States v. *Lyon*, 397 F.2d 505, cert. denied, 393 U.S. 846	17
United States v. *Maze*, 414 U.S. 395	12, 13
United States v. *Mayer*, 556 F.2d 245	15
United States v. *Miles*, 480 F.2d 1215	15
Constitution, statutes and rule:	
United States Constitution, Sixth Amendment	14
18 U.S.C. 371	3
18 U.S.C. 1341	3, 13
18 U.S.C. 1623	4
18 U.S.C. 1952	3
18 U.S.C. 3282	13
28 U.S.C. 1254(1)	2
Rule 14, Fed. R. Crim. P.	11

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-340

ERNEST R. HAMILTON AND CHARLES W. SCHUBERT, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 78-5313

CORNEL LEAHU, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-396

CHARLES C. FITZGERALD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-398

ALFRED KOVACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 579 F.2d 1014.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1978. Timely petitions for rehearing were denied on July 31, 1978 (Pet. App. A15-A18). The petitions for a writ of certiorari in No. 78-340 and 78-5313 were filed on August 29, 1978, and August 30, 1978, respectively. The petitions for a writ of certiorari in Nos. 78-396 and 78-398 were filed on September 8, 1978. Extensions of time within which to file those petitions were granted until that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence at trial showed that petitioners were engaged in multiple conspiracies rather than a single conspiracy (Petitioners Leahu and Kovach).

2. Whether the district court committed reversible error in refusing to sever petitioners Kovach's and Fitzgerald's trial from that of their co-defendants.

3. Whether the evidence showed the mailings involved in the counts charging mail fraud (Count II-VI) were in furtherance of the scheme to defraud.

4. Whether petitioner Leahu's convictions for conspiracy and mail fraud (Counts I-VI) and petitioner Kovach's conviction for conspiracy were barred by the statute of limitations.

5. Whether the district court improperly limited petitioners Fitzgerald's, Hamilton's, and Schubert's right to cross-examination when it refused to allow them to inquire into the nature of the charges a witness believed he was facing at the time he was granted immunity to testify.

6. Whether certain comments by the prosecutor during closing argument were improper (Petitioners Hamilton and Schubert).

7. Whether the courts below erred in determining that petitioner Leahu was a "bribeable official" under Indiana State law for purposes of charging that one of the objects of the conspiracy alleged in Count I was to violate the Indiana bribery statutes (Petitioners Hamilton, Schubert, Fitzgerald, and Leahu).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, each petitioner was convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 (Count I). In addition, petitioners Hamilton, Schubert, Fitzgerald, and Leahu were convicted of five substantive counts of mail fraud, in violation of 18 U.S.C. 1341 (Counts II-VI), and conspiracy to frustrate an Internal Revenue Service investigation, in violation of 18 U.S.C. 371 (Count VIII).[1] Petitioner Kovach was also con-

[1] Count VII charging petitioners Hamilton, Fitzgerald, Schubert, and Leahu, with bribery, in violation of 18 U.S.C. 1952, was dismissed on motion of the government at the close of its case in chief.

victed of committing perjury before a grand jury, in violation of 18 U.S.C. 1623 (Count IX). Petitioners Hamilton, Schubert, Fitzgerald, and Leahu were each sentenced to seven concurrent terms of five years' imprisonment on Counts I-VI and VIII and fined $10,000 on Count I. Petitioner Kovach was sentenced to two concurrent terms of five years' imprisonment on Counts I and IX and fined $10,000 on Count I. The court of appeals affirmed in a comprehensive opinion, on which we basically rely (Pet. App. A1-A14).[2]

The facts are fully summarized in the opinion of the court of appeals (Pet. App. A1-A14). Petitioners engaged in an elaborate scheme to defraud the East Chicago Indiana Board of Sanitary Commissioners of more than two million dollars and of the loyal services of public officials, and to obstruct the Internal Revenue Service in the computation, assessment, and collection of taxes. Bids on the approximately fifteen million dollar Indiana sewer project were due on September 22, 1969. Shortly before that date, petitioners Hamilton and Schubert, directors of the architectural, engineering, and consulting firm of Russell, Schubert, and Hamilton, Inc., which was under contract with the Board to design the project, met at least four times with Miles Hernly, President and Director of Hernly Brothers, Inc., a Parker, Indiana construction company; Melvin Wetterlin, owner of a business which designed and sold engineering control systems; and petitioner Fitzgerald, Director of Fitzgerald and Stutz, Inc., another construction company. At these meetings the parties discussed and made changes in the Hernly Brothers' proposed bid on the project. They agreed that Fitzgerald and Stutz would enter into a joint contract with Hernly to complete the project and that the profits would be divided into five equal shares—Hamilton and Schubert to receive two of the shares for recommending to the Board that it accept the Hernly Brothers bid, and Hernly, Wetterlin, and Fitzgerald, to receive the three other shares. To conceal their profits and avoid income taxes they agreed to a scheme devised by Wetterlin (the Wetterlin Plan) whereby Hernly Brothers would enter into spurious consulting contracts with a foreign straw corporation through which the illicit profits would be funnelled as alleged payments on the contracts and deducted as business expenses, thus enabling the conspirators to retrieve and divide the money free of income taxes.

About September 20, 1969, two days before bids on the project were due for submission to the Board, petitioners Hamilton, Schubert, Fitzgerald, and coconspirators Hernly and Wetterlin met at the Palmer House in Chicago, with petitioner Leahu, Superintendent of the Board, and petitioner Kovach, an East Chicago store owner with political connections. At this meeting Leahu and Kovach indicated they would need one million dollars to pay "East Chicago officials" in order to assure that Hernly Brothers were awarded the contract. The parties also agreed to utilize the Wetterlin Plan to hide their profits and

[2] "Pet. App." refers to the appendix to the petition in No. 78-340.

conceal the bribe. They furthermore resolved to use the Wetterlin Plan to conceal another million dollars in order to cover the possibility of having to pay taxes on the first million dollars if the IRS discovered it. Finally, they agreed to place co-defendant Lawrence Hinesley, a manufacturer's representative for firms involved in the sale of waste-water treatment equipment, on the Fitzgerald and Stutz payroll and pay him for false invoices submitted on the project in order to compensate him for loss of his commission for sales of lift stations due to deletion of the stations from the Hernly Brothers bid.

The Board awarded the contract to Hernly Brothers on September 23, 1969. Shortly thereafter, Hamilton, Fitzgerald, Wetterlin, Hernly, and Schubert traveled to Europe to carry out the Wetterlin Plan. They retained the Zurich, Switzerland accounting firm, Allgemeine-Treuhand (Allgemeine) to make the necessary arrangements. Allgemeine acquired the stock of Ingenieur Tiefbau A.G. (ITAG), a defunct corporation, divided its stock into five equal shares among Hamilton, Schubert, Wetterlin, Hernly, and Fitzgerald, and transferred the stock in trust to Allgemeine. The Board gave final approval to the contract in early January 1970, after Leahu and Kovach obtained a fraudulent performance bond for Hernly, who was unable to obtain a bona fide bond. Fitzgerald and Stutz then formed the joint venture with Hernly Brothers that they had agreed upon earlier.

Between February 1970 and November 1971 Hernly Brothers paid over two million dollars to ITAG from project funds through fraudulent use of change orders.[3] From February 1970 until June 1971, Hernly, Hamilton, Schubert, Fitzgerald, and Wetterlin retrieved one million dollars from ITAG and paid it to Leahu. Although Hinesley performed no work, he was placed on Fitzgerald and Stutz's payroll and paid through false invoices submitted on the project. The remainder of the illicit profits was split in equal shares among Hamilton, Schubert, Wetterlin, Fitzgerald and Hernly. In November 1971, Hinesley retrieved $35,000 from ITAG, out of which he paid $25,000 to Schubert. In October 1971, in Zurich, Hamilton received an ITAG accounting, and in January and February 1972, Hernly mailed letters to ITAG which stated that Hernly Brothers' intended to pay ITAG $20,000 and $30,000 to complete the contracts. The Swiss connection was shut down in early 1972.

The net "profit" on the project exceeded six million dollars. Hamilton and Schubert wanted to receive their shares tax-free or at a reduced tax rate and suggested investing the profits in oil properties. In April 1971, Fitzgerald and Stutz and Hernly Brothers formed a joint venture with BESSI, a Denver-based investment firm. The joint venture was called Colum-

---

[3] The change orders were documents of the engineers reflecting changes in the original plans and specifications and requiring either additional expenditures or revision of certain expenditures.

bine I, and it was formed to transfer profits from Hernly Brothers to Hamilton and Schubert. Hernly Brothers and Fitzgerald and Stutz (the limited partners) contributed $3.2 million of project profits to BESSI (general partner) for investment for exploring and developing oil producing properties. Forty percent of the profit from the investments was to be paid to Hamilton and Schubert for their one-fifth shares of the sewer project profits.

In January 1972, Hamilton and Schubert sold their interests in Columbine I to BESSI in exchange for promissory notes valued at $1,090,930 each. In December 1972, BESSI filed a petition in bankruptcy. Hamilton and Schubert compromised their claims against it for about $75,000.

ARGUMENT

1. Petitioners Leahu (78-5313 Pet. 12-17), Fitzgerald (78-396 Pet. 8-12), and Kovach (78-398 Pet. 10-18) contend that the proof at trial showed the existence of multiple conspiracies to defraud rather than a single conspiracy as charged. Petitioners Leahu and Kovach argue that the evidence demonstrated they participated only in the bribery aspect of the scheme, which they maintain commenced with the Palmer House meeting in Chicago and ended in June, 1971, when Leahu was given the final installments on the $1,000,000 bribe by their co-conspirators. Petitioner Fitzgerald does not explain the nature of the variance he claims.

Petitioners' contentions were answered by the court of appeals (Pet. App. A8) when it stated:

> This was a complex conspiracy which included minor or subsidiary agreements, each one of which involved some but not all of the conspirators. It is immaterial that each of the appellants did not participate in all the activities or even know all the details of the conspiracy. *Blumenthal* v. *United States*, 332 U.S. 539, 557-58 (1947); *United States* v. *Hickey*, 360 F.2d 127, 138 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976). They are bound as long as the results fall within the common purposes of the conspiracy and appellants knowingly contributed toward its furtherance. *United States* v. *Greer*, 467 F.2d 1064 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973). As in *Blumenthal*, each subsidiary agreement here was a step in the formation of a larger conspiracy with common goals.

The evidence showed not only that petitioners participated in the Palmer House meeting with Schubert, Wetterlin, and Hernly to discuss bribing state officials (Tr. 879-880), but that petitioners were present during the discussions about how the cash should be generated (Tr. 3019-3020), including discussions about use of change orders (Tr. 2948), laundering money through Switzerland, returning it in tax free cash (Tr. 82), and sending an additional million dollars Leahu and Kovach indicated they needed to effect the bribery (Tr. 2949). In fact, Leahu was told

by Hernly after the meeting in Switzerland, in which petitioner Fitzgerald participated and at which ITAG was set up, that the mission in Zurich had been accomplished and that it was up to Leahu to see that the contractors' estimates were paid so that the "money could flow" (Tr. 1028). Petitioners' presence during and participation in the Palmer House meeting and their subsequent actions were sufficient to establish that they agreed to an over-all conspiracy not only to commit bribery but also to accomplish a wide-ranging number of objectives including fraud and tax evasion.

Contrary to the contention of petitioners, it does not matter that they did not directly participate in all the acts of fraud proved at trial. In order to convict for conspiracy, it is only necessary to show the defendants knowingly agreed to a mutual undertaking to accomplish an unlawful scheme. *Kotteakos* v. *United States*, 328 U.S. 750, 754-755 (1946). As the Second Circuit explained in *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944), when a person "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." See also *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947).

2. A number of other contentions raised by petitioners fall with their first claim.

(a) Petitioners Fitzgerald (78-396 Pet. 8-12) and Kovach (78-398 Pet. 18-24) argue that their motion

for severance should have been granted because the evidence did not show they participated in all aspects of the conspiracy. Since, however, the evidence showed that petitioners were well aware of the over-all scope of the conspiracy to which they agreed and therefore were accountable for the actions their co-conspirators took in furtherance of it, severance was not required. See Rule 14, Fed. R. Crim. P.; *Shaffer* v. *United States*, 362 U.S. 511, 514-517 (1960); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

Accordingly, this case is clearly distinguishable from *United States* v. *Kelly*, 349 F.2d 720, 756-759 (2d Cir. 1965), holding that severance should have been granted because a very weak case against one defendant was unfairly bolstered by "spill-over" from the proof against much more clearly culpable defendants.

(b) Petitioner Leahu's argument (78-5313, Pet. 15-17) that the mailings involved in Counts II through VI were not in furtherance of the scheme to defraud in which he was involved (allegedly ending in June 1971) is likewise without merit. These mailings were clearly in furtherance of the over-all scheme in which petitioner was involved.

All of the mailings charged in the indictment were from ITAG in Switzerland to the East Chicago, Indiana post office box of Hernly Brothers, Inc., and all were received during the time that Hamilton, Schubert, and Leahu continued to exercise fiduciary authority over the project. All invoices for payment were

entered into the ITAG books as payments due to ITAG (Tr. 5716, 5733, 5831; Gov't Exh. 53B). All of the ITAG invoices, including these mailings, were intended from the outset as a means to generate and conceal a fund in Switzerland which would "launder" and transmit bribes, kickbacks, and other payments to the conspirators. Each of the mailings was therefore a fraudulent act designed to create the appearance that the ITAG corporation was a legitimate subcontractor on the project which was providing legitimate services and billings and being paid in a routine business manner. This appearance was essential if the conspirators were to realize the fruits of their scheme while any one of them maintained his professional relationship to the project. Each mailing was therefore "incident to an essential part of the scheme" and satisfied the requirements of the mail fraud statute. See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

The critical nature of the use of the mails makes this case distinguishable from those on which petitioner relies. In *Kann* v. *United States*, 323 U.S. 88, 94 (1944), this Court held that where the defendants had fraudulently cashed a check and obtained the proceeds directly from a bank in one transaction, the fact that the check was subsequently mailed to the drawee bank for collection did not by itself make the use of the mails a component of the fraudulent scheme. Similarly, in *United States* v. *Maze*, 414 U.S. 395 (1974), and *Parr* v. *United States*, 363 U.S. 370 (1960), the fraudulent use of credit cards was

held not to constitute an offense under 18 U.S.C. 1341 where the only use of the mails proven was that the credit card bills were eventually sent to the cardholder. In this case, in contrast to *Kann* and *Maze*, the scheme depended on the role played by the mails in the collection of the illicit profit.

(c) Nor is there any substance to the claim—advanced by petitioner Leahu (78-5313 Pet. 12-15) with respect to his convictions on the conspiracy count (Count I) and the five substantive counts of mail fraud (Counts II-VI) and by petitioner Kovach (78-398 Pet. 17-18) with respect to his conviction for conspiracy (Count I)—that their prosecution was barred by the statute of limitations, 18 U.S.C. 3282, because their involvement in the scheme ended in June 1971, more than five years before the September 1976 indictment was issued. In fact, petitioners' involvement did not end then, and as the court of appeals noted in respect to the conspiracy count (Pet. App. A9), there were a number of overt acts charged (including Hinesley's traveling to Switzerland on November 5, 1971, to obtain $35,000 in ITAG funds, $25,000 of which he paid to Schubert, as well as the Columbine venture which lasted until late 1972) that took place within the limitations period and which the jury, having been instructed on the need to find an overt act during the five years before the indictment (Instruction 22), could have found were in furtherance of the conspiracy. Moreover, each of the mailings alleged in the five substantive counts (78-5313 Pet. 15) was well within the five-year statute of limitations.

3. Petitioners Hamilton, Schubert (78-340 Pet. 11-13) and Fitzgerald (78-396 Pet. 16-19) contend that the district court violated their Sixth Amendment right of confrontation by erroneously limiting their cross-examination of Hernly who had been granted immunity, when it sustained objections to petitioners' questions about the penalties Hernly was facing when he was given immunity. Although a defendant may not be deprived of the right to "effective" cross-examination when he is attempting to show bias on the part of a government witness (*Davis* v. *Alaska*, 415 U.S. 308, 315-16 (1974)), this right is not unlimited, and a trial court's discretionary determination limiting cross-examination will not be subject to reversal absent a showing of an abuse of discretion. *United States* v. *Bastone*, 526 F.2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976). Here the court of appeals correctly concluded that "the jury had sufficient information to make a discriminating appraisal of the witness' motives and bias" (Pet. App. A13). Hernly's eleven day testimony included exhaustive cross-examination on his receipt of immunity, government payment of his subsistance expenses, both his personal and corporate liability for civil tax assessments and fraud penalities, personal tax liability, his attempts to obtain immunity for his Swiss associates, as well as his remaining investment interests resulting from the scheme. Under these circumstances, the court of appeals properly concluded that Hernly's testimony

during cross-examination provided sufficient information to the jury to expose his possible motives and bias. See *United States* v. *Miles*, 480 F.2d 1215 (2d Cir. 1973); *United States* v. *Blackwood*, 456 F.2d 526, 530 (2d Cir. 1972), cert. denied, 409 U.S. 863 (1973); *United States* v. *Campbell*, 426 F.2d 547, 550 (2d Cir. 1970); see also *United States* v. *Mayer*, 556 F.2d 245, 250 (5th Cir. 1977); *United States* v. *Garrett*, 542 F.2d 23, 25 (6th Cir. 1976).

4. Petitioners Hamilton, Schubert (78-340, Pet. 8-11), and Leahu (78-5313 Pet. 17-18) contend that certain comments in the prosecutor's closing argument required reversal of their convictions.[4]

(a) Petitioners Hamilton and Schubert complain that the following comment by the prosecutor improperly suggested that Hernly was telling the truth because he had been granted immunity (Tr. 7106):

> Now, it's a problem. And I think we've, well, we've all lived through these last years, and there's a lot of controversy about immunities. It's no secret. Its a very difficult process. But how do you find out about crimes like this unless you grant someone immunity? Further, as to the distastefulness of what we did, this immunity was granted by a Federal Judge upon petition of the Government. If there was something illegal or unethical about it, do you suppose it

[4] The statements which petitioners' challenge, were not objected to during the course of the prosecutor's rebuttal argument. Objections were raised only after the jury left for deliberations.

> would have happened? Do you suppose you would have been here hearing Hernly's testimony? We know you wouldn't have, but the fact of the matter is, you did. You can't ignore any of the testimony in this case. You've got to consider it all, weigh all the factors, and after you do that, if you find you absolutely can't believe somebody, then throw his testimony out. But the fact that he's been granted immunity is not a factor which will deny us the right to use a man's testimony, particularly when its been granted by the Federal Judges as it has in this case.

As the district court noted (Tr. 7178) these comments were addressed to petitioner Hamilton's argument that if the jury disapproved of the grant of immunity, they were entitled to view the evidence which resulted from it as suspect and acquit (Tr. 7092-93). The comments therefore correctly explained the necessity of granting immunity to uncover criminal conduct. Viewed in this light, the comments were not improper and could not have misled the jury.[5]

---

[5] The cases upon which petitioner relies involved situations where the prosecutor's comments could be construed as implying that "the Government witnesses were telling the truth because district court judges had independently seen fit to grant them immunity." *United States* v. *Hollinger*, 553 F.2d 535, 548 (7th Cir. 1977). See also, *e.g.*, *In Re Daley*, 549 F.2d 469 (7th Cir. 1977); *Thompson* v. *Garrison*, 516 F.2d 986 (4th Cir. 1975), cert. denied, 423 U.S. 933 (1975); *In Re Grand Jury Investigation*, 486 F.2d 1013 (3d Cir. 1973). That obviously was not what happened here where the prosecutor's comments were directed to rectifying an improper implication of the defense.

(b) Petitioner Leahu argues that the following comments of the prosecutor violated his right against self-incrimination (Tr. 7139):

> [As] I told you before, just because Mr. Leahu gets his million dollars doesn't mean he can blithely walk away from this conspiracy and say: 'I am not involved in this any more. I got my money.'
>
> He can't do that. He didn't do it in this case. He got his money and that's all he did. He kept his mouth shut * * *.

Petitioner argues these statements amounted to a comment on his failure to testify at trial and were therefore prejudicial error because the jury could infer that he was under a duty to explain where the illicit money went. The district court properly concluded that "* * * it didn't appear * * * that the government attorney was arguing that the defendants were failing to take the stand" (Tr. 7176). In context, the challenged portion of the prosecutor's argument simply asserted that petitioner was responsible for the acts of his co-conspirators in the overall scheme and obviously were not "* * * of such a character that the jury would naturally and necessarily take it to be a comment on the defendants' failure to testify." See *United States* v. *Lyon*, 397 F.2d 505, 509 (7th Cir.), cert. denied, 393 U.S. 846 (1968).

5. Finally, petitioners Hamilton, Schubert (78-340 Pet. 13-14), Fitzgerald (78-396 Pet. 12-19), and Leahu (78-5313 Pet. 18-24) contend that the

courts below erred in determining that petitioner Leahu was a "bribeable official" under Indiana law, which makes it unlawful to bribe any "employee of a political subdivision" of Indiana or any person holding "any lucrative office, or appointment or agency under the Constitution or any law of the State of Indiana for the purpose of procuring [a] public contract * * *." They argue that they could not be convicted under Count I of the indictment charging conspiracy with use of interstate facilities to bribe "because an Indiana sanitary district is not a municipal corporation within the meaning of the two percent tax limitation provision of the Indiana State Constitution," and therefore petitioner Leahu as Superintendent of the Board was not an employee of a political subdivision of the State of Indiana.

As the court of appeals noted, relying on the Indiana courts' interpretation of their own laws, petitioners' contention lacks merit (Pet. App. 10):

> The Indiana legislature did not intend to create an entity separate from municipalities when it created sanitary districts. See *Archer* v. *City of Indianapolis*, 233 Ind. 640, 122 N.E. 2d 607, 610-11 (1954). Like the chief of police and other department heads appointed by the mayor, Leahu was a public officer and an employee of the municipality. *See State* v. *Carey*, 241 Ind. 692, 175 N.E. 2d 354 (1961); *Klink* v. *State ex rel. Budd*, 207 Ind. 628, 194 N.E. 352 (1935); *Archer*, *supra*. As such, he was a bribeable official under Indiana law.

There is thus no reason for this Court to review this contention. See *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 270 (1928).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
JOHN C. WINKFIELD
Attorneys

NOVEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 277381 191

8 8 8 9 8 9 8

3 3 6 9 7 3 8